IN THE SUPREME COURT OF FLORIDA

EDWIN H. BEATY,

PetitionedAppellant,

v.

Case No. 89,356
2 DCA Case No. 96-03252

STATE OF FLORIDA,

Respondent/Appellee.
_____/

DISCRETIONARY REVIEW OF DECISION OF
DISTRICT COURT OF APPEAL, SECOND DISTRICT
STATE OF FLORIDA

RESPONDENT'S BRIEF ON JURISDICTION

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PRELIMINARY STATEMENT

The instant appeal originated from the trial court's summary denial of a time-barred Rule 3.850 motion for post-conviction relief. Accordingly, pursuant to Rule 9.140(g), Florida Rules of Appellate Procedure, no briefs were filed in the Second District Court; and this is the first opportunity for the State of Florida to submit a brief on appeal in the instant case.

STATEMENT OF THE FACTS

In 1991, petitioner was represented by the Office of the Public Defender on direct appeal. (Rule 3.850 motion at 2). On June 2, 1993, his conviction was affirmed, per curiam, on direct appeal without a written opinion. Table citation: Beatty v. State, 621 So. 2d 437 (Fla. 2d DCA 1993). According to petitioner, he thereafter sought pro se "review by certiorari" in the Florida Supreme Court, and this "review by certiorari" was denied on September 10, 1993.

On July 27, 1995, petitioner filed a Rule 3.850 motion for post-conviction relief. The trial court found that the petitioner's motion was untimely because his judgment and sentence "became final" upon the issuance of the mandate on June 22, 1993, or more than two years before the filing his post-conviction motion. The trial court specifically found that the petitioner failed to sufficiently allege any exception to the two-year requirement under Rule 3.850(b)(1), Florida Rules of Criminal Procedure. On appeal, the Second District Court concluded that the trial court correctly measured the two-year period from the issuance of the mandate, and not from the Florida Supreme Court's purported denial of an unauthorized "review by certiorari." Beaty v. State, 21 Fla.L. Weekly D2308 (Fla. 2d DCA Case #96-03252, Opinion filed October 23, 1996).

SUMMARY OF THE ARGUMENT

Petitioner fails to establish any express and direct conflict between the decision in the instant case and prior decisions of this Court or another district court of appeal. Therefore, this Court should decline to exercise discretionary jurisdiction to review this case.

ARGUMENT

BECAUSE THE OPINION OF THE SECOND DISTRICT COURT OF APPEAL DOES NOT "EXPRESSLY *AND* DIRECTLY" CONFLICT WITH THE PRIOR DECISIONS OF ANOTHER DISTRICT COURT OF APPEAL OR THE SUPREME COURT ON THE *SAME* QUESTION OF LAW, THIS COURT SHOULD DECLINE TO EXERCISE ITS DISCRETIONARY JURISDICTION.

In 1980, the Florida Constitution was amended to provide that this Court "[m]ay review any decision of a district court of appeal . . . that expressly and directly conflicts with a decision of another court of appeal or of the Supreme Court on the same question of law." Article V, §3(b)(3), Florida Constitution; Jenkins v. State, 385 So.2d 1356 (Fla. 1980). The Florida Constitution does not give this court appeal or discretionary jurisdiction to review a district court's per curiam affirmance without a written opinion. Id.

In discussing the amendment, this Court relied on the definitions of "express" and "expressly" contained in Webster's Third New International Dictionary (1961 ed. unabr.). "Express" is defined as "to represent in words;" "to give expression to." "Expressly" is defined as "in an express manner." Id. at 1359. In order to have and express a direct conflict, the majority opinion in the case in which certiorari jurisdiction is sought must refer to the decision alleged to be in conflict on

the same question of law. Conflict between decisions must appear within the four corners of the majority decision. Reaves v. State, **485 *So.*** 2d 829, **830** (Fla. 1986).

In the instant case, the Second District Court affirmed the trial court's summary denial of post-conviction relief because Beaty's motion was not filed within two years of the court's mandate on direct appeal and Beaty did not allege any basis to extend the two-year period contained in Rule **3.850(b),** Florida Rules **of** Criminal Procedure. The trial court measured the two-year period from the issuance of the mandate, and not from this court's alleged denial of an unauthorized "review by certiorari." According to the decision **of** the Second District, in a direct appeal in which the judgment and sentence are affirmed without a written opinion, the judgment and sentence "become final" when the mandate issues on direct appeal.

The allegedly conflicting decisions relied upon by the petitioner in support of his jurisdictional argument were addressed and distinguished **by** the Second District Court in its opinion. **As** the Second District explained,

> In ***Nava v. State, 659 So.* 2d 1314** (Fla. 4th **DCA** 1995), the Fourth District held that **a** prisoner could file **a** motion pursuant to rule **3.850** "within two years of the termination, by denial **of** a petition for writ **of** certiorari in the supreme court, of Appellant's plenary appeal." We have been unable to locate a written opinion by the Fourth District in Mr. Nava's direct appeal. Thus, we presume that the Fourth District affirmed the direct appeal without a written opinion. In reaching its decision, the Fourth District relied upon the following statement from ***Huff v. State,* 569 *So.* 2d 1247, 1250** (Fla. **1990):** "If a writ **of**

certiorari is filed in the United States Supreme Court, the two-year period does not begin to run until the writ is finally determined." The facts in ***Huff***, however, reveal that it was a capital case. The United States Supreme Court had jurisdiction to review the written opinion in that death penalty case.

We are not convinced that the rule in ***Huff*** should apply in this case. Although Mr. Beaty could file papers in the Florida Supreme Court, the constitution gives that court no appeal jurisdiction or discretionary jurisdiction to review this court's ***per curiam*** affirmance of Mr. Beaty's judgment and sentence because it was rendered without a written opinion. ***See*** Art. V, §3(b), Fla. Const.; Fla. R. App. P. 9.030(a); ***Jenkins v. State, 385 So.*** **2d** 1356 (Fla. 1980). No pleadings he may have filed in the Florida Supreme Court divested the trial court of its jurisdiction to review **a** motion pursuant to rule 3.850. We **see** no reason to pretend that his judgment and sentence did not become final because of his frivolous pleadings in the supreme court. Assuming that ***Nava*** involved an affirmance without written opinion, its holding encourages prisoners to file inappropriate and futile pleadings in the Florida Supreme Court.*[fn 2]*

We distinguish cases in which prisoners have timely sought supreme court review **of** district court decisions affirming **a** judgment and sentence by a written opinion. ***See State v. Meneses*****, 392 *So.*** 2d 905 (Fla. **1981); *Brown v. State,* 617 *So.*** 2d 1105 (Fla. 1st DCA 1993). See ***also Ward v.*** *Dugger*, 508 ***So.*** 2d **778** (Fla. 1st DCA **1987).** When a district court issues a written opinion, there is **a** possibility that the supreme court will take jurisdiction over the case. The fact that the two-year time limitation for the filing of a rule 3.850 motion runs from the supreme court's denial of review in cases in which it has the constitutional power of review is no reason to extend the time in cases in which it has no jurisdiction to review the judgment and sentence. The argument in Justice England's dissent in ***Meneses,*** which convinced two other justices in a case involving a written opinion, appears to be more persuasive in a case of ***per curiam*** affirmance without a written opinion. 392 ***So.*** **2d** at **907** (England, J., dissenting).

Significantly, at footnote 2 of its opinion, the Second District Court expressly declined to certify conflict with Nava v. State, 659 So. 2d 1314 (Fla. 4th DCA 1995), because the court was not certain that Nava involved *aper curiam* affirmance without a written opinion. Because petitioner has failed to establish any express and direct conflict, this Court should decline to accept jurisdiction.

CONCLUSION

Based upon the foregoing reasons, arguments, and citations of authority, Respondent submits that this Honorable Court should decline to exercise its discretionary jurisdiction to review this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. regular mail to inmate Edwin Beaty, 350297, M.B. #359, Charlotte Correctional Institution, 33123 Oil Well Road, Punta Gorda, Florida 33955, on this 17th day of December, 1996.

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COUNSEL FOR RESPONDENT